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Supreme Court of the United States

WILLIAM M. BARRETT, as President of the Adams Express Company,
Petitioner,

against

ARTHUR H. VAN PELT,
Respondent.

BRIEF FOR RESPONDENT.

Statement.

This case is before the Court on a Writ of Certiorari to the Supreme Court of the State of New York to review an order of the Appellate Division for the First Department affirming a judgment of the Supreme Court, New York County, entered in favor of the plaintiff for the sum of $3,345.65. The action was brought to recover damages for loss in market value due to delay in the transportation of a carload of eggs, a perishable food product. The car of eggs was delivered to the defendant at Louisville, Kentucky, on February 23, 1918, and not delivered to the consignee in the City of New York until March 4, 1918.

The sole defense relied upon by the defendant, and upon which evidence was offered, was that no claim had been filed with the defendant within four months after the delivery of the car of eggs in the City of New York.

The Appellate Division of the Supreme Court of the State of New York, in affirming the judgment of the lower Court, held that the plaintiff had established a *prima facie* case, and that as a carrier is forbidden under the First Cummins Amendment to the Interstate Commerce Act to require the filing of a claim as a condition precedent to recovering damages for delay, the alleged defense was insufficient.

The petitioner contends that the decision of the Supreme Court of the State of New York is based upon an erroneous interpretation of the Federal Law; that the First Cummins Amendment at most prohibits carriers requiring the filing of written claims in cases of negligent delay; that the burden of proof is on the shipper to prove such negligence, and that this is not satisfied by the mere proof of delay beyond a reasonable time for delivery.

POINT I.

The construction placed on the First Cummins Amendment to the Interstate Commerce Act by the Court below is correct.

At common law, a common carrier is absolutely liable, where such liability is not limited by the contract, for all loss, damage or injury to property in its possession for transportation, except when occasioned by act of God or the public enemy. When such loss, damage or injury to the goods themselves is not due to either of the excepted causes, the question of *negligence is immaterial.* Not so as to damages due to delay in transportation. Unless a stipulated time for delivery is fixed by contract, the rule is that the carrier is bound to use reasonable diligence and care

in transporting, and *only negligence* will render the carrier liable.

The absolute liability of the carrier for loss, damage or injury to the goods themselves could, however, as a general proposition, be limited by contract between the parties, except where such loss, damage or injury was due to negligence, and in some of the States such contract could provide for exemption from liability even when such loss, damage or injury was due to negligence.

And so it had come to pass, Congress having enacted no law on the subject and State Courts following the decisions of their own highest Court and the lower Federal Courts in such States following the decisions of the State Courts, that the law applicable to interstate shipments by common carriers was not uniform. However, by the Carmack Amendment to the Interstate Commerce Act in 1906 (34 U. S. Stat., 584), all policies of the States in reference to interstate shipments by common carriers were superseded. That law provided that "no contract, receipt, rule or regulation" should exempt a common carrier from liability for loss, damage or injury. The law was thus made uniform, so far as interstate shipment was concerned, that it was against public policy to permit a carrier to exempt itself from liability for negligence.

The Carmack Amendment to the Interstate Commerce Act, however, imposed no restriction on the right of a carrier to require the filing of a claim as a condition precedent to recovering for loss, damage or injury and this Court, long prior to the enactment of that Amendment, had declared the requirement of such a notice valid.

As the Carmack Amendment superseded all

other laws on the subject, all State prohibitions, constitutional or statutory, against common carriers requiring the giving of a notice or the filing of a claim as a condition precedent to recovery were, after the passage of that Amendment, so far as interstate shipments are concerned, void and inoperative.

A form of receipt was in use by some carriers, which provided that "claims for loss, damage or delay must be made in writing to the carrier at the point of destination or at the point of origin within four months, or in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made, the carrier shall not be liable." This form of receipt had been agreed upon by certain carriers and shippers, and, on June 27, 1908, the Interstate Commerce Commission had recommended it for use among all carriers (*Matter of Bills of Lading*, 14 I. C. C. Rep., 346).

Provisions in shipping contracts, limiting the time within which suit might be brought, or providing that carriers should not be liable for damages unless a claim should be made within a specified time, had been repeatedly passed upon by this Court prior to the Amendment to the Interstate Commerce Act in 1915, and had been sustained or rejected, depending in each case whether the provision was or was not considered to be reasonable.

In the various forms of receipts in use, no distinction was made as to the requirement of filing a claim between claims for loss or damage due to negligence and those where the question of negligence was immaterial.

This Court having held in *Adams Express Co.* v.

Croninger, 226 U. S., 491, that, although a common carrier could not under the Carmack Amendment exempt itself from liability for its own negligence or that of its employees, the rigor of that rule might be modified by a fair, reasonable and just agreement with the shipper which did not include exemption from negligence, Congress in 1915 passed what is known as the First Cummins Amendment to the Interstate Commerce Act. That Amendment absolutely prohibited the making of any agreement which would operate to prevent a recovery of the full actual loss, damage or injury from the carrier; and further provided, as follows:

> "*Provided, further,* that it shall be unlawful for any such common carrier to provide by rule, contract, regulation or otherwise, a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years;
>
> "*Provided, however,* that if the loss, damage or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

This was the first legislation by which Congress undertook to regulate the period within which carriers could limit the time for giving notice of claims, for the filing of claims and for the institution of suits. The question is, did Congress have any classification in mind or is this provision as to filing claims a mere arbitrary division without any basis for the distinction as to the requirement.

The petitioner contends that the punctuation clearly indicates that it was intended that the ex-

ception to the authority permitting carriers to require the filing of claims should cover only two classes—first, claims for delay or damage in loading or unloading and second, claims for damage in transit by carelessness or negligence, and that these two general classes were marked off by commas. It says in its brief (p. 9):

> "If the word 'delay' has no relation to the phrase 'while being loaded or unloaded,' it is obvious that there was no reason for inserting a comma after the word 'unloaded.' If there had been no comma inserted after the word 'unloaded' or if there had been commas after both 'delay' and 'unloaded,' it would seem reasonable to assume that the draftsman of the bill intended that there should be three general classes of exceptions. The fact that he used a comma in one place and did not use it in an other would indicate that he had the definite purpose of marking off two general classes of claims, *i. e.* (1) delay or damage while being loaded or unloaded, (2) damage in transit."

If the petitioner is correct and the statute is to be construed by reference to the punctuation alone, the words "carelessness or negligence" in the second proviso of the amendment qualify the words "or damaged in transit" only and not the words "damage while being loaded or unloaded." If this be so, the carrier is authorized to require the filing of claims for damages alleged to be due to delay while in actual transit between the point of origin and the point of destination, but not for delay in loading or unloading whether due to negligence or not, or for damages to the property itself in loading or unloading whether due to negligence or not, or for damage to the property itself in transit when due to negligence.

A carrier, however, is not an insurer against delay and recovery for delay, whether in loading or unloading or in actual transit, can only be predicated upon negligence. This is so even if as a matter of form an action in damages sounds in contract as upon an implied agreement to deliver within a reasonable time.

> 10 *Corpus Juris*, pages 284, 285, and cases cited.

It follows, therefore, that if the words "carelessness or negligence" do not qualify the words "damage while being loaded or unloaded," the Statute purports to relieve a shipper from filing a claim for delay in loading or unloading, although he must prove negligence in order to recover, and also to relieve him from filing a claim as to physical damage to property in loading or unloading not due to negligence, although in such a case, the carrier is an insurer of the goods.

When property is delivered to a carrier for immediate transportation and nothing remains to be done by the shipper, it has always been the law that the liability of the carrier as such attached at once, and the reasonable time within which delivery must be made was to be reckoned from the time the goods were delivered to and accepted by the carrier. Whether the delay occurred at one stage of the transportation or another was of no importance. Must the consignor or consignee now ascertain after the goods have been delivered to and accepted by the carrier, just where the delay occurred in order to know whether he is required to file a claim or not?

The contention of the petitioner that the word "delay" has reference only to delay in loading or

unloading is a mere afterthought based on the clumsy wording of the proviso. On the trial the objection made was not that the evidence did not show that the delay had occurred in loading or unloading (where according to the petitioner no claim would be required), but simply and broadly that no claim had been filed, thus indicating that the contention then advanced was that the filing of a claim is a condition precedent to recovery in all cases of delay in transportation, whether in loading or unloading or in actual transit.

The absurdity of attempting to construe the statute by reference of the punctuation alone is shown by the statement of the petitioner in his brief on the application for the Writ (p. 29).

> "So far as the transportation of inanimate objects is concerned, it is clear that any exception as to damage while being loaded or unloaded is one that would be practically insignificant. If even such damage were of sufficiently common occurrence to make it worth while specifically to except from the general operation of the Act, it seems clear that it would, as a practical matter, be impossible ever to prove that an inanimate object, which was delivered in a damaged condition, had been injured while being loaded or unloaded."

If you substitute the word "delay" for the word "damage" in this statement the whole situation, as we see it, is made clear. How could a shipper prove that the delay was in loading or unloading and not in transit so as to make the provision as to the filing of a claim as a practical matter of any force or effect, if the petitioner is correct? The petitioner in its present brief abandons its former argument and admits that instead of being an argument in its favor that the former argument is

practically one against its contention. It now says (p. 11):

> "The plaintiff's best argument against construing the section as it reads, is the apparently insignificant classification that would be created by an exception referring to claims for 'delay * * * while being loaded or unloaded.' He can very plausibly urge that so far as the original shipper is concerned, the number of claims in which the damage is caused by delay in loading or unloading is small, and the number of cases where such damage can be proved to have occurred in this manner is even smaller."

The petitioner asserts, however, that the language under consideration was not put in the First Cummins Amendment for the benefit of the ordinary shipper, but that it was adopted solely for the benefit of live stock shippers. We are unable to find any justification for such conclusion in the discussions alleged to have taken place before the sub-committees of the Senate and House of Representatives, as set forth in the petitioner's brief. However, for the sake of argument, assuming that the language under discussion was put in the Amendment for the benefit of livestock owners, it is not understood why a shipper of livestock should be compelled to ascertain whether the delay was in loading or unloading, or in transit in order to ascertain whether or not he is compelled to file a claim. The duty and obligation of the carrier begins when the livestock is delivered into its pens,

> *Covington Stock Yards Co.* v. *Keith*, 139 U. S., 128,

and whether the delay occurred at one stage of

the transportation or another, the carrier, in the absence of a good excuse therefor, is liable for an unreasonable delay whether the shipment be of animate or inanimate objects.

It does not seem possible that Congress intended any such confusing and impracticable division as to the requirement of filing claims as that indicated by the punctuation.

The reason for permitting a carrier to require notice of claim for loss or physical damage does not apply in the case of loss of market value due to delay. As stated by the Appellate Division of the Supreme Court in *Johnson* v. *M., K. & T. R. R. Co.*, 107 N. Y. App. Div., 375:

> "* * * the reason for requiring prompt notice of loss or damage to the property itself is apparent, for in such case it is obvious that prompt notice is required in order to enable the defendant to investigate the extent of the injury and the facts relative thereto, but in the case of a claim for damage to the shipper resulting from loss of market occasioned by delay, the carrier does not need to be promptly notified in order to ascertain the facts. The market quotations are preserved and can be ascertained at any time, and records must be kept by the different lines over which the property is transported, so that it should be possible at any time to ascertain the time of receipt by any given carrier and the delivery by it to the next succeeding carrier." Followed in *Frey* v. *N. Y. Cent. & H. R. R. R. Co.*, 114 A. D., 747.

The provisions of the Cummins Amendment here under consideration, however, do not appear to have been directly passed upon by this Court.

In *Gooch* v. *Oregon Short Line R. R. Co.*, 258 U. S., 22, this Court had before it an agreement in

a drover's railroad pass, conditioning his right to recovery for personal injuries upon giving written notice of claim within thirty days after he had been injured. It was held that the provision was not in violation of the Cummins Amendment for the reason that the Cummins Amendment did not cover claims for personal injuries.

In a dissenting opinion, however, by Mr. Justice Clarke, which was concurred in by the Chief Justice and by Mr. Justice McKenna, it was stated:

> "In the matter of Bills of Lading, 29 I. C. C., 417, 419, and *in re* the Cummins Amendment, 33 I. C. C., 682, 691, the Interstate Commerce Commission says that, while the uniform Bill of Lading has long contained a four months' limitation for presenting damaged claims for freight, no effort has been made by carriers generally to enforce it, until the Croninger case was decided in January, 1913 (226 U. S., 491), but that in December of that year, they began to enforce it literally and thereby 'created multitudes of unjust discriminations.' *Only about one year of such enforcement was necessary to cause the enactment of the Cummins Amendment of March 4, 1915, which made an end to the matter where property was damaged in transit by negligence,* and in any case rendered a limitation of less than ninety days unlawful."

This would indicate that the three Justices concurring in this dissent were of the opinion that the filing of a claim could not be required after the enactment of the Cummins Amendment in any case founded on negligence, and a claim for unreasonable delay in transportation is such a case.

In its brief submitted in support of the application for a writ of certiorari, the petitioner set forth that the present case was especially important in

view of the fact that the Interstate Commerce Commission has now required the carriers to adopt a provision (p. 16):

> "That 'suit for loss, damage *or delay* shall be instituted only within two years and one day after the date when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part thereof.'"

In its present brief this statement does not appear. After calling attention to, and setting forth, the amendment to the Cummins Amendment in 1920, providing that the time for the institution of suits in certain cases should be "computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice," the petitioner says in its present brief (p. 20):

> "We believe that the spirit of this amendment and the purpose which it sought to accomplish was fair and just. However, it is apparent that where the carrier cannot require the filing of the claim for damage, the claimant's time to bring suit will be indefinitely extended until such time as he chooses to present his claim and have it acted upon by the carrier. * * *"

It is clear from a reading of the amendment of 1920 that this statement is not correct. Prior to the amendment of 1920 the carrier could require the filing of a notice of claim in not less than 90 days and the filing of a claim in not less than four months, except where the loss, damage or injury was based on negligence. In all cases, however, whether based on negligence or not, and whether, therefore, it could require the filing of a claim or

not, it could require the filing of suit in not less than two years. The amendment of 1920 simply extended the time for bringing suit until two years after the carrier has disallowed the claim, to those cases where the law required the filing of a claim, namely, to those not based on negligence, and as to those cases it could only be extended indefinitely in case the carrier indefinitely failed to give written notice of disallowance.

POINT II.

There is no conflict of judicial opinion as to the proper interpretation of the First Cummins Amendment to the Interstate Commerce Act.

The petitioner set forth, as one of the reasons why this Court should issue a writ of certiorari (p. 9):

> "(b) There has already been a conflict of judicial opinion as to the proper interpretation of the first Cummins amendment to the Interstate Commerce Act."

And Point II in its brief in support of the petition was to the same effect. The petitioner has apparently concluded that none of the cases cited in its former brief in any way sustained its contention with the result that no such claim is advanced in its present brief.

In the case of *Hunt* v. *Hines*, 233 S. W., 798, the highest Court of Missouri held that the First Cummins Amendment prohibited carriers from requiring the filing of written claims for delay in transportation. The Appellate Division, First Department, of the Supreme Court of the State of New

York, in *Bell* v. *New York Central R. R.*, 187 N. Y. App. Div., 564, and the Court of Appeals of Cook County, Illinois, in *Conover* v. *Wabash R. R. Co.*, 208 Ill. App., 105, held to the same effect.

In *Gillette Safety Razor Co.* v. *Davis*, 278 Fed., 864, the U. S. Court of Appeals, First Circuit, and in *Hailey* v. *Oregon Short Line R. R. Co.*, 253 Fed., 569, the U. S. District Court for the Southern District of Idaho, held that the classification intended by Congress in the First Cummins Amendment was based on negligence.

In *Gillette Safety Razor Co.* v. *Davis, supra*, the U. S. Circuit Court of Appeals for the First Circuit, said that it was apparent that the true reading of the proviso of the Cummins Amendment here under consideration is

> "That if the loss, damage, or injury complained of was due to delay (in the delivery of such property) or (it was) damage (d) while being loaded or unloaded or damaged in transit by carelessness or negligence, then no notice of claim, nor filing of claim, shall be required as a condition precedent to recover."

This construction of the proviso is what the respondent is here contending for.

POINT III.

Upon showing an unreasonable delay the burden is on the carrier to show a legal excuse for such delay, if he has one.

The burden is on the shipper to show that the carrier has failed to deliver the goods within a reasonable time. When evidence of such an unreasonable delay is adduced, a sufficient *prima*

facie case of negligence is made out which adequately sustains the burden of proof the shipper has to assume. The burden is then on the shipper to explain the delay and to show that it arose from some cause other than its own negligence. If there is any excuse for an unreasonable delay, the facts in regard to such excuse are peculiarly within the knowledge of the carrier and it is incumbent upon the carrier to at least prove, if not to allege, the facts showing such excuse.

In this case the car of eggs was delivered to the express company at Louisville, Kentucky on February 23, 1918, and was not delivered in the City of New York until March 4, 1918. In other words, it took the express company nine days or two hundred sixteen hours to transport and deliver the car of eggs. The testimony shows that the ordinary traveling time for a passenger train between New York and Louisville is from twenty-five to twenty-six hours. The General Agent of the Adams Express Company reported under date of May 16, 1918 (Plaintiff's Exhibit D) that car #6083, which was the car in which the eggs were received in New York (Plaintiff's Exhibit E):

> "Out on Penna #307, February 23rd. We have no information as to any transfer being made of these cars. The same should have gone direct by Indianapolis to Pittsburg without transfer."

At what point the delay actually occurred, whether between Louisville and Pittsburg or between Pittsburg and New York, and whether or not such delay was due to an unavoidable accident or other good excuse, is something that the shipper could not possibly ascertain. And this is so as to the delay to any shipment.

The Appellate Division of the Supreme Court of the State of New York held that the plaintiff in the present case had established a sufficient *prima facie* case of unreasonable delay and as no excuse for such delay was offered by the carrier, the plaintiff was clearly entitled to recover.

> *Ward* v. *N. Y. C. R. R.*, 47 N. Y., 29;
> *Tierney* v. *N. Y. C. & H. R. R.*, 76 N. Y., 305;
> *10 Corpus Juris*, page 301 and cases cited.

If, however, the petitioner is correct and proof of an unreasonable delay does not make out a *prima facie* case of negligence and sustain the burden which the shipper must assume, then the effect of the provisions of the First Cummins Amendment to the Interstate Commerce Commission is to require the filing of a claim as a condition precedent to recover in all cases of delay, although a claim for delay is one based on negligence.

Again, assuming that the Statute is to be read as "delay in loading or unloading"; in such event no notice is required. The unreasonable delay is admitted here. The question then arises, where did the delay arise? Does the burden rest on plaintiff to prove that the delay did arise in loading or unloading, or does it rest on the carrier to show that it arose otherwise?

The plaintiff does not have to show the place of delay in order to establish negligence. Upon proof of an unreasonable delay he can rest on the presumption of negligence.

The Statute provides that in certain instances notice shall not be required as a "condition precedent." Impliedly, therefore, it may be required in other instances. The defendant claims the benefit

of the implication, but where is the proof that the delay arose other than in loading or unloading?

POINT IV.

The judgment of the Supreme Court of the State of New York should be affirmed.

Respectfully submitted,

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